

On the Experience of Legal Regulation of the Principle of Publicity of Local Authorities in German Law

Denis S. Mikheev¹, Tatiana N. Mikheeva¹ & Marina A. Mokoseeva¹

¹ Mari State University, Yoshkar-Ola, Russia

Correspondence: Tatiana N. Mikheeva, Mari State University, Lenin square, 1, Yoshkar-Ola, 424001, Russia.
E-mail: tnmiheeva@marsu.ru

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Abstract

The article examines the experience of legal regulation of the key principle of organizing the local authorities—publicity in the legal acts of Germany. The structure of the German state and Russia is a federation and this fact affects the law making activity. It is carried out by a federation, its entities and municipalities. The analysis aims at identification of the specific features which reflect the principle of publicity in regulations. Their peculiarity lies in the fact that the law of the lands bears the main burden of regulation in this area. The examples of specific rules of Bavaria testify that many of them contain elements of the principle of publicity of local authorities. In particular, a great attention is paid to the issues of civil initiatives, civil solutions and civil petitions in the Bavarian legal acts, which, according to the author, should be attributed to the basic elements of the analyzed principle of publicity. Research of the German experience has shown that existence of a legal basis for publicity enables the citizens to participate in decisions making of the municipal bodies, as well as directly make their own proposals for improving various spheres of their local life. Such approach proves that it is the principle of publicity that creates conditions for the activity of the population in their place of residence. Thus, we achieve the important objective to ensure the effectiveness of the local government.

Keywords: local authorities, the principle of publicity, elements of the principle, legal regulation, civil initiative

1. Introduction

The institute of local authorities with its settled traditions has found a wide legal formulation and practical implementation in the number of foreign states, which have developed the system of attracting population to management at the local level, support of the civil initiatives in the municipal area of the state government, consultations of power with territorial groups prior to making important decisions on the local life issues. According to R. V. Babun, attracting initiative groups of citizens to the solution of local issues has become the norm for municipal authorities in the countries with democratic structure (Babun, 2010). The analysis of foreign experience in this part is interesting, because many problems of Russia in this regard are not exclusive, but represent a manifestation of some common to all or at least most of the world community trends (Salov, 2001).

The implementation of local self-governing by the population is a complicated process that requires its members to acquire certain knowledge and skills. Investigation and practical use of foreign experience in local government can significantly accelerate the process of mastering the skills to participate in the enforcing the power (Neznamova, 2009).

It is necessary to recognize in this field the practice of communal self-government of Germany as particularly useful, because:

- Both countries are modern federations, wherein Russian federalism is largely based on the German model;
- Both municipal systems have common historical sources as rural and urban self-government in Russia in the 19th century was focused on the Prussian municipality, that is associated with the reforms of Baron von Stein;
- Russian legal system is the closest to the continental legal system of Germany.

According to E. V. Gritsenko, reference to German theoretical concepts, revealing the meaning of self-government communities and their associations (i.e. communal government), provides a new, deeper

awareness of the principles incorporated into the basis of the Russian model of the local self-government, anticipation of the problems, that may arise in the implementation of this model, and propose options for their solutions (Gritsenko, 2001).

A well-known Russian specialist L. A. Velikhov, who studied the problem of local authorities at the beginning of the last century, also attached great importance to the analysis of foreign experience, especially emphasizing Germany (Velikhov, 1999).

In this regard, it is necessary to identify how the principle of publicity is fixed in the German legal acts. It is the key principle of the system of the local government and implies the open character of the local authorities; providing citizens with information concerning the work of municipal bodies, ensuring public participation in the matters of local importance (Mikheev, 2012). According to Mikheeva the local government itself allows people living in the local area and having common interests to decide the range of issues (Mikheeva, 2012).

It seems necessary to study the practice of cooperation of municipal bodies of Federal Republic of Germany with population and civilian structures. The issues of interaction between government and institutions of civil society with establishing direct and feedback connections are actual for Russia, as well developing the dialogue of law enforcement bodies and social structures (Mikheeva, 2013).

In order to analyze these legal acts it was necessary to identify positive examples that can be successfully implemented in the Russian local self-government.

2. Methods

Methodological basis of the study was a comparative legal method of cognition of legal phenomena, which had revealed legal features for the principle of transparency of local authorities or its elements in some legislative acts of German lands.

The scientific value of this approach is that it has allowed studying and comparing the general patterns and differences in the manifestation of the investigated principle in the legislation and municipal practice in one of lands of Germany—Bavaria. Evaluation of the received knowledge revealed a tendency to create certain legal conditions in the German lands for the population activity, its influence on the decisions made by the local governments. It gives grounds to review theoretical bases of the principle of publicity in the local government of Russia.

In the study of practical and legal experience of Federal Republic of Germany the author has also used a number of other methods developed by legal and philosophical sciences. As a part of a general scientific dialectical method classical ways of cognition and making conclusions were in demand: analysis, analogy, ascent from the abstract to the concrete and others. They, together with systemic structural features, have allowed revealing the features of manifestation of individual elements of the principle of publicity in the Bavarian normative legal acts. In particular, it is fixed that the citizens have the right to make their own initiatives and the duty of local authorities to consider these civic initiatives and bring them for voting of the residents.

This analysis was also based on legalistic method. It allowed us to estimate the key normative legal acts, Constitution of Bavaria, Bavarian Legal Code on communities and other items from the standpoint of regulation of the principle of publicity of the local government.

3. Results and discussion

In Germany, the regulation of local government is exercised at the federal level, in the subjects of federation—in lands and at the local level—in communities.

However, the bulk of legal regulation of this institution is concentrated in the lands. Constitution (The Basic Law of the Federative Republic of Germany) includes only one Article 28, which provides:

“People should have representation in the lands, counties and communities, established as a result of general, direct, free, and equal and secret ballot. In communities, an elected body can be replaced by a communal assembly. Communities should be given the right to regulate all local affairs within the law under their own responsibility” (The Basic Law of the Federal Republic of Germany of May 23, 1949)

E. Marquart considers the lack of general federal statute governing local government logical (Marquart, 2007).

The Basic Law has no direct assertion of the principles of organization of local authorities. The Article 28 of the Constitution defines only the principles of election of local authorities and independence of local communities' decisions on local issues. However, objectively, implementation of both principles, mentioned above, is accompanied by the principle of publicity, although, it has not found direct constitutional regulation.

The study of lands legislation shows that, despite a sufficient legal independence in selecting the system of local authorities, all members of the Federation have adopted similar legislative acts—Provisions about counties and Regulations on communities, which are basic for the organization of local government in each of the lands. While, every province has its own constitution, but textually, they did not go beyond the Article 28 of the Basic Law, dated May 23, 1949. The Provision on communities of various federal lands and many aspects of the organization and activity of local authorities are regulated differently, but the system of local government organization within each land is the same, i.e. extends to all municipal entities of the appropriate type (Isupova, 2012). Meanwhile, entities of the Federation went further and settled separate spheres of municipal relations by special laws.

In this connection, the implementation of the studied aspect in the German state of Bavaria should be considered a success. In its normative legal acts there is a tendency to regulate many elements of the principle of publicity of the local authorities.

The basic principles of organization of local authorities were enshrined in the Article 11 of the Constitution of the Free State of Bavaria of December 2, 1946, the Code of the Bavarian communities of December 18, 1945 (Scholler, 2007), which were subjected to some further changes. Besides these legal acts, that have absolute priority in the management of local government, the number of special laws was also adopted in Bavaria—the Code of Counties, the Law on Local Referendum and Civil Initiative, the Regulation on joint management of communities (Marquart, 2007).

Part 2 of the Article 11 of the Constitution of Bavaria, devoted to community self-government, as well as the federal constitutional provision is compact and has the same meaning.

We note that, despite its brevity, the Bavarian constitutional provision serves as a legal foundation for the development of municipal activities on the principles of independence of the territorial communities, respect and consideration of their views and open to community life. We can confidently state, that the main elements of the principle of community self-publicity found the proper place in the Bavarian Constitution.

A special place in the Bavarian law is occupied by the regulation of activity and cooperation of citizens in solution of local issues, where the principle of transparency, cementing the right of citizens to local authorities is fully manifested.

The Article 18 of the Bavarian Code on Communities enshrines the right of citizens to participate in public meetings to discuss local issues of life in the community. At the same time, the duty to consider the recommendations of the representatives of the territorial community entrusted to the community management bodies. However, on October 1, 1995 citizens voted at the referendum for a change in the Bavarian Code of communities on securing the significant expansion of people's rights on their own initiatives in the matters of municipal life. Then, the Code on communities was supplemented by the Article 18a, regulating the procedure governing civil initiatives and civil solutions in details (Stimpfl, 2007). This amendment, in fact, fixed the implementation of the principle of publicity in its broadest manifestation: open and public introduction of their own proposals by the citizens of the community, the responsibilities of relevant authorities to accept them and consider. As for Russia, which seeks to develop the civil society, to engage public in solving the issues of local importance it would be useful to comprehend this experience under modern conditions.

The essence of these democratic procedures is as follows. Residents of the community, on their own initiative, can make a proposal to require the decision of any issue relating to the competence of the community, to accept the resolution on it. This citizens' initiative should be considered binding, even if the community council does not agree with the formulation of the proposal. According to H. Stimpfl, residents are not required to offer sources for potential costs during this civil initiative. Thus, the citizens of the community are entitled to participate in making decisions. Decisions can be taken only on their own community affairs, that is, the affairs of the local community (e.g., community-based services concerning drinking water supply, wastewater; construction of sports and recreation facilities; community roads; preservation of customs and cultures; commuter passenger transport; nursery schools or nursing homes; raise of handicraft and industrial enterprises and other similar problems) (Stimpfl, 2007).

According to Part 17 of the Article 18 of the Bavarian Code on communities civic initiative in compliance with statutory formalities (certain number of signatures, text, rationale, etc.) is introduced to the community council, which verifies its affordability, including legal aspects. The community council makes a decision on the admissibility of the civil initiative or on refusal, which can be appealed in the court. Further, the admitted initiative is put for voting of the residents of the community (referendum). In accordance with Part 16 of the Article 18a of the Bavarian Code on communities, the public should be informed on the results of the civil

judgment through the local community newspaper, announcement on the stands of the community, a daily newspaper, etc. according to the local rules and traditions (Stimpfl, 2007).

Civic initiative has some similarity with domestic local referendum procedure, but in general, it seems “softer”, more flexible, easier implemented, whereby, it is more marketable.

Similar legislative acts in German law are based on “natural” rights, specific to local communities. A. I. Cherkasov cites the opinion of the German scientist Z. Belleys, who considers that municipalities are primarily “natural corporate units” and their autonomy derives not so much from the state power and the desire of higher state bodies to provide municipalities with a certain autonomy but from the sovereignty of the people, who must be respected and ensured by the state in practice (Cherkasov, 2011).

Another rule of the Bavarian Law Code on communities is based on this promise—Part 1 of the Article 18, obliges the first burgomaster, at least once a year, but upon the request of the Community Council more often, to convene a meeting of citizens in order to discuss community issues. The legal regulation contains, in our opinion, two elements of the principle of publicity—open discussion of local issues and the element of public scrutiny from citizens over the activities of local authorities.

4. Conclusion

Modern states as a basic fundamental principle in the legal regulation of local government put the publicity at the forefront, as a tool linking the local authorities with the residents of municipalities (Mikheev, 2014).

These legal provisions indicate that the principle of publicity found its legal consolidation in the norms associated with the organization of local authorities, primarily at the level of federal lands. Although, a single article on the local authorities in the Basic Law of Germany also allows seeing the elements of the analyzed principle. Examples of the State of Bavaria eloquently illustrate, that the right to self-government can be effectively implemented only on condition that it is based on the principle of publicity, which allows wide engaging of the population into the affairs of the community. This is confirmed by the orientation of Bavaria toward civic initiatives and civil decisions, providing the local population with sufficient authority to influence decision-making in German communities.

Within the frame of this scientific article such element of the principle of publicity of the local government as public scrutiny of the citizens over the activities of local authorities was left outside the research. This element of the principle of publicity due to its important social and legal significance should become a further independent study in the future. Public control seems a vital form of control activities on an equal basis with state control (Mikheeva & Yaichnikova, 2012).

The study of its legal regulation in the Federal Republic of Germany is particularly relevant since the law was adopted in Russia. The concepts of subjects and objects of social control, its shape, and the rights of public controllers and legal consequences of the obtained results are settled incompletely. This law should be further elaborated. Analysis of the experience of the German state in this part can prompt the legal algorithm for implementation of public control into municipal practice of Russia

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